IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: ANTOINETTE KITCHEN,	)	Chapter 13
Debtor.	)	Case No.: 16-11359-BFK
ANTOINETTE KITCHEN,	)	
Plaintiff,	)	A.P. No. 16-01191
v.	)	
WELLS FARGO BANK, NA d/b/a WELLS FARGO DEALER SERVICES,	)	
Defendant.	)	

OBJECTION TO AMENDED APPLICATION BY DEBTOR'S COUNSEL FOR APPROVAL AND PAYMENT OF ATTORNEY'S FEES AND COSTS

Wells Fargo Bank, NA, d/b/a Wells Fargo Dealer Services ("WFDS"), through the undersigned counsel, hereby objects to the Amended Application By Debtor's Counsel for Approval and Payment of Attorney's Fees and Costs (Dkt. No. 36) (the "Amended Motion for Fees"), and respectfully states as follows:

Introduction

On February 16, 2017, Plaintiff filed an Amended Motion for Fees which contained (i) an Amended Memorandum Supporting Application for Approval and Payment of Attorney's Fees and Costs (the "Amended Memorandum"); (ii) an Amended Notice of Expert; (iii) amended Sworn Statements from Mr. Weed and Ms. Kitchen; (iv) new Sworn Statements from two additional individuals with Mr. Weed's law firm; and (v) an "Amended Statement of Time and Costs." The Amended Motion for Fees, like the original motion, fails to establish a legal basis to award additional fees to Ms. Kitchen or her counsel. In short, the legal fees under 11 U.S.C. § 362(k)(1) were included in the offer of judgment that has been accepted, and there is no legal basis to award additional fees. Moreover, even if there were a legal basis to award fees to Plaintiff, the Amended Motion for Fees falls far short of satisfying the requirements for such an award.

1. The Offer of Judgment Includes Attorney's Fees.

In the Amended Memorandum, Plaintiff again opens her legal argument with a purported quotation from the United States Court of Appeals for the Fourth Circuit. This alleged quotation does not appear in the case cited. Plaintiff argues:

> The Fourth Circuit court of Appeals has held that "an offer of judgment pursuant to Fed. R. Civ. P. 68(a) which makes no mention of costs or attorney's fees cannot be interpreted, after the fact, to have included those costs and fees. Rather, in such a case, the prevailing party is entitled to recover costs and fees pursuant to 42 U.S.C. § 1988." *Bosley v. Mineral County Com'n*, 650 F.3d 408 (4th Cir. 2011).

Amended Memorandum (Dkt. No. 36-7), p. 2. There is no pinpoint citation for this quotation, which does not appear in the *Bosley* decision. As this statement does not appear in the decision, Plaintiff's argument is misleading to the Court. It is also wrong.

The Fourth Circuit Court of Appeals has explicitly recognized that, when attorney's fees are a substantial part of the substantive relief sought in an action, then the judgment offered under Rule 68 encompasses the claim for attorneys' fees. *First Financial Ins. Co. v. Hammons*, 58 Fed. Appx. 31 (4th Cir. 2003). Other courts agree. *See Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390 (7th Cir. 1999) ("if the fees that the plaintiff is seeking in this case are part of the substantive relief they are covered by the part of the Rule 68 offer that refers to the judgment.") As recognized by the Fourth Circuit, the key factor is whether the attorneys' fees are a principal part of the relief being sought. *See Bosley*, 650 F.3d at 412-413.

In *Hammons*, the Fourth Circuit considered an offer of judgment brought by an insurance company in response to a counterclaim in which its insured asserted an improper failure to defend a property damage claim. The insurance company offered "to allow judgment to be taken against it in this matter in the sum of Ten Thousand Dollars ($10,000.00). " The insured accepted the offer of judgment, then moved for attorney's fees under a West Virginia law that allows an insured to recover fees if it prevails in such coverage disputes. The Fourth Circuit affirmed the district court decision denying the motion for fees, emphasizing that "attorneys' fees were not something sought outside of the pleadings" but instead "constituted a large part of the relief sought in the [Counterclaim] itself." *Hammons*, 58 Fed. appx. 31 at * 3 (quoting district court decision). The Fourth Circuit continued:

> The [district] court aptly observed that, where "attorneys' fees are actually a part of the substantive relief sought in the [judgment], then using the word 'judgment' alone in an offer to settle the matter creates no ambiguity." As such, the offer of judgment made by [plaintiff] was, in this setting, unambiguous: the "judgment" that [plaintiff] offered encompassed the … claim for attorneys' fees that [insured] advanced in his Counterclaim.

Hammons, 58 Fed. appx. 31 at * 3 (internal citation to district court omitted).

In Ms. Kitchen's case, the attorney's fees clearly were a substantial part of the relief sought in the complaint. In fact, attorney's fees are the only actual damages that were sought in the complaint. The complaint does not identify separate counts and contains the following prayer for relief:

> WHEREFORE Debtor prays that this Court will enter an order requiring Wells Fargo to fix Debtor's title within 24 hours, to award Debtor punitive damages in an amount of $100,000, award

> attorney's fees and for any and other relief this Court deems equitable and just.

(Dkt. No. 1, p. 4). Thus, Plaintiff sought three types of relief: (1) a mandatory injunction (equitable relief); (2) actual damages in the form of attorney's fees; and (3) punitive damages.

It is undisputed that, under section 362(k)(1), actual damages include attorney's fees. 11 U.S.C. § 362(k)(1) (refers to "actual damages, including attorney's fees and costs").[1] Not only are attorney's fees a clear component of actual damages, but the courts have recognized that attorney's fees can be the only actual damages in a claim for a violation of the stay under § 362(k)(1). *See In re Duby*, 451 B.R. 664, 676 (1st Cir. BAP 2011) (noting that "attorney's fees are actual damages under 11 U.S.C. § 362(k)(1)" and affirming a fee award for a stay violation where plaintiff recovered no other damages); *see also Warren v. Dill (In re Warren)*, 532 B.R. 655, 665-66 (Bankr. D. S.C. 2015) (recognizing that attorney's fees can be the predominant form of damages under § 362(k)(1)).

In this case, the offer of judgment clearly and unambiguously encompasses all claims in the adversary proceeding complaint, including the claim for attorney's fees. The offer of judgment provides:

> Defendant Wells Fargo Bank, NA, d/b/a Wells Fargo Dealer Services ("Wells Fargo"), offers to allow judgment to be taken against it as to the claims stated by Plaintiff Antoinette Kitchen ("Kitchen") in the complaint in this adversary proceeding in the amount of $10,000.00.

(Dkt. No. 19, p. 1). The offer of judgment specifically provides for judgment "as to the claims stated … in the complaint." The claims stated include the demands for injunctive relief, actual

[1] Punitive damages are listed separately are require a different standard of proof. 11 U.S.C. § 362(k)(1).

damages (attorney's fees) and punitive damages.[2] As attorney's fees are the only type of actual damages sought, they are by definition "a part of the substantial relief" sought (as discussed in *Hammons*) and the case is "one that principally sought recovery of attorney's fees and costs" (as discussed in *Bosley*).

Plaintiff accepted an offer of judgment "as to the claims stated by Plaintiff Antoinette Kitchen ("Kitchen") in the complaint." One of these claims, the claim for actual damages, was for attorney's fees. She is not entitled to additional attorney's fees above those included in the offer of judgment.

2. The Amended Time and Expenses Report is Fatally Flawed.

Although Plaintiff is not entitled to any additional fees, she submitted an "Amended Time and Expense Report" (the "Amended Fee Statement") in an attempt to establish her fees in this case. This Amended Fee Statement suffers from enormous problems. Most prominently, Plaintiff's counsel has improperly modified virtually every time entry and a large number of the charges in an attempt to correct deficiencies previously identified. This should not be permitted, and renders the Amended Fee Statement useless.

In the interest of preserving time and costs, WFDS will only highlight some of the obvious flaws in the Amended Fee Statement:

- The written descriptions of the services performed have been modified from the entry in the prior Statement of Time and Expenses (Dkt. No. 23-4) filed in this matter.

[2] A plaintiff who accepts an offer of judgment as to the claims and a complaint cannot subsequently pursue injunctive relief. *Bevier v. Blue Cross Blue Shield of South Carolina*, 2008 WL 2077924 at * 2 (D. S.C. May 14, 2008) (Rule 68 offer of judgment that does not include any language which might limit the scope of the judgment "necessarily resolves all of Plaintiff's claims as to all forms of relief sought in the complaint," including injunctive relief). Thus, when Plaintiff in this case accepted the offer of judgment on January 4, 2017 (Dkt. 19) and subsequently asked the Court to "order Defendant to produce and present the vehicle title to Miss Kitchen and to order Defendant to pay any and all costs associated with such production," (Dkt. No. 21, p. 4), she was again asking the Court to grant relief that is beyond what is permitted after acceptance of an offer of judgment.

- In a large number of instances, the modified description eliminates terms that demonstrate why the services are not compensable, such as: pursuing a preliminary injunction with knowledge that WFDS had already acted to get the title reinstated (11/8/2016); removing references to Ms. Kitchen's Chapter 13 case (10/18/2016; 12/30/2016); drafting discovery that was never served (12/3/2016, 12/5/2016), and eliminating the reference to Mr. Weed's improper attempt to contact Wells Fargo directly instead of communicating through counsel (1/3/2007).

- In addition to changing the time entries to try to eliminate obviously disqualifying material, counsel *increased* the amount charged for numerous entries. *See, e.g.*, 6/8/09, 8/30/09, 103/09, 10/6/09, 10/17/09, 10/18/09, 11/8/09, 11/9/09, and 12/1/09.

Counsel should not be permitted to modify time entries and increase charges in an attempt to bolster a clearly insufficient fee application. The attempts to whitewash items that are clearly not recoverable in this adversary proceeding -- such as items related to the chapter 13 case -- raises larger issues.

To be clear, Plaintiff is not entitled to any attorney's fees above those that were included in her damages in the offer of judgment. But even if she were, the Amended Fee Statement, like the prior one, is woefully deficient and does not provide any evidentiary basis to award fees. Although Plaintiff revised and amplified her prior filings, she still fails to address (or satisfy) the applicable legal standards for an award of fees, and fails to satisfy the requirements set forth in *In re Seaton*, 462 B.R. 582, 595 (Bankr. E.D. Va. 2011), *Skillforce, Inc. v. Tichenor*, 509 B.R. 523 (E.D. Va. 2014), *Robinson v. Equifax Info. Services, LLC*, 560 f.3d 235, 243 (4th Cir. 2009), and elsewhere. In *Seaton*¸ Judge St. John addressed the concerns of an excessive litigation approach to alleged stay violations:

> The policy of section 362[k], to discourage willful violations of the automatic stay, is tempered by a reasonableness standard born of courts' reluctance to foster a 'cottage industry' built around satellite fee litigation. It is well established that [r]easonable and necessary fees do not include unnecessary litigation costs.

Seaton, 462 B.R. at 604 (quoting *In re Miller*, 447 B.R. 425, 434 (Bankr. E.D. Pa. 2011) (internal quotations and citations omitted). The concerns expressed by Judge St. John are highly relevant in this case.

WFDS reiterates its objection to the fees statements and notice of expert witness, and reserves the right to raise all objections to any evidence regarding fees at a hearing.

WFDS incorporates by reference its Objection to Application for Fees and Expenses (Dkt. No. 35) as if fully set forth herein.

Conclusion

For all of these reasons, the Amended Motion for Fees should be denied in its entirety.

Respectfully submitted,

/s/ J. David Folds

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF.

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